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Constitutional Law -- Local Laws -- Regulation of Professions -- Real Estate Brokers

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that the court which rendered a certain judgment had the requisite authority and that the parties were legally brought before the court is conclusive on the question and is not open to collateral attack.[39] Mere irregularities cannot be set up against the judgment when brought in question in another state[40] but it is well settled that the defense may be interposed that the judgment was obtained by fraud.[41]

The principal case follows the weight of authority. The defendant not having shown lack of jurisdiction or fraud in the procurement of the judgment could not overturn it. Defendant was estopped to show lack of jurisdiction by setting up its own violation of the statute requiring it to designate the Insurance Commissioner as its attorney to accept service.

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Constitutional Law—Local Laws—Regulation of Professions—Real Estate Brokers.

In 1868 the General Assembly of North Carolina was given constitutional power to tax trades and professions.[1] In 1899 the first license tax was placed on real estate dealers.[2] A tax on this trade for the purpose of raising revenue has continued to the present[3] and paying this has been the only state-wide legal requirement for engaging in the real estate business.

In 1927 an act[4] was passed which made the qualifications for obtaining a license in eight counties depend upon the applicant's ability to show to the satisfaction of a Real Estate Commission his reputation for honesty and fair dealing and his competency to transact the business in such a manner as to safeguard the public.[5]

This statute was held unconstitutional in *State v. Warren*[6] on the ground that it was local in effect, applying to but eight counties, and was thus discriminatory and in violation of the right to equal protection of the laws. Had the act been applicable to the whole state, the majority opinion implies that it would have been a valid use of the police power.

[39] Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628 (1893); Citizens' Nat. Bank v. Consolidated Glass Co., 83 W. Va. 1, 97 S. E. 689 (1919).

[40] Drummond v. Lynch, 82 F. (2d) 806 (C. C. A. 5th, 1936).

[41] Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538 (1890); Jaster v. Currie, 198 U. S. 144, 25 Sup. Ct. 614, 49 L. ed. 998 (1904); Cannon v. Howell, 131 N. C. 125, 42 S. E. 555 (1902); Levin v. Gladstein, 142 N. C. 448, 55 S. E. 371, 32 L. R. A. (N. S.) 905 (1906); Mottu v. Daniels, 151 N. C. 237, 65 S. E. 969 (1909); Roberts v. Pratt, 152 N. C. 731, 68 S. E. 240 (1910); Ring and Wellborn v. Whitman, 194 N. C. 544, 140 S. E. 159 (1927); Bonnett-Brown Corp. v. Coble, 195 N. C. 491, 142 S. E. 772 (1928).

[1] N. C. CONST. art. V, §3.
[2] P. L. N. C. 1899, c. 2, §50.
[3] P. L. N. C. 1935, c. 371, §100.
[4] Public-Local Laws 1927, c. 241.
[5] The act likewise provided eleven causes for which the license might be suspended or revoked.
[6] 211 N. C. 75, 189 S. E. 108 (1937).

The effect of the decision is that the state can set character and professional qualifications for *all* real estate brokers and salesmen, but cannot regulate only a *part* as the sale of real estate is state-wide and can be regulated only by general laws which affect every county.

It was not specifically stated which constitutional provisions were violated by the act. It was condemned because it was not state-wide and because it was discriminatory. The North Carolina Constitution prohibits local legislation relating to trade;[7] therefore, if the regulation of real estate men so as to insure honesty and business capability can be classed as a regulation of the real estate trade, then perhaps the legislation was invalid under this constitutional provision. But the court did not refer to the provision. If the court thought that the act in question did contravene the prohibition, no doubt it would have been indicated. Therefore, we turn to the second objection to the act.

The giving of exclusive emoluments or privileges is forbidden by the North Carolina Constitution;[8] the taking of life, liberty or property without due process are forbidden by both the North Carolina Constitution[9] and the Fourteenth Amendment; denial of equal protection of the laws is forbidden by the Fourteenth Amendment. These are doubtless the constitutional prohibitions which the court had in mind when it said that the act was unconstitutional because discriminatory. An examination of the cases involving local laws wherein discrimination or lack of due process was urged shows three classes of attempted regulations under the police power. First, when the matters regulated were of such a nature that local sentiment and circumstances were mainly responsible for the enactment, the test for determining whether discrimination existed has been whether the act equally affected all within the territory defined in the act.[10] When the police power was invoked to require Indian children to attend school longer than white, a warning was sounded when two dissenting justices argued that this law was an invalid departure from the constitutional requirement of uniformity in all the essentials of the school system.[11] Uniformity here meant uniformity throughout the state. Second, in the field of criminal law, the court said in condemning a local law making the killing of cattle

[7] N. C. CONST. art. II, §29.
[8] N. C. CONST. art. I, §7.
[9] N. C. CONST. art. I, §17.
[10] Local liquor laws held constitutional because locally uniform: State v. Muse, 20 N. C. 463 (1839); State v. Barringer, 110 N. C. 525, 14 S. E. 781 (1892); State v. Barrett, 138 N. C. 630, 50 S. E. 506 (1905). Local laws regulating dogs held constitutional: State v. Blake, 157 N. C. 608, 72 S. E. 1080 (1911) (citing cases involving local laws on many subjects); Newell v. Green, 169 N. C. 462, 86 S. E. 291 (1915). Local law relating to the use of profanity on the property of a certain mill in one county upheld: State v. Warren, 113 N. C. 683, 183 S. E. 498 (1893). The disposition of cotton in three counties regulated: State v. Moore, 104 N. C. 714, 10 S. E. 143 (1889).
[11] State v. Wolf, 145 N. C. 440, 59 S. E. 40 (1907).

by a railroad in certain counties a misdemeanor that an act divested of any peculiar circumstances and *per se* made indictable should be equally and uniformly indictable throughout the state.[12] However, it was not pointed out in this case, or in a majority of the others, what part of the constitution was violated. Third, when under the guise of a police regulation, agents in certain counties were required to pay a thousand dollar license fee before hiring laborers to work outside the state, the court held such fee to amount to a tax on a vocation and void for lack of uniformity required of taxes on trades or professions.[13] It was pointed out that the legislature in exercising police power, as the term police power is commonly interpreted, is not restrained by the constitutional provision for uniformity. (Uniformity here presumably means uniformity throughout the state.)

An examination of the legislation regulating other trades and professions discloses that these laws have been all-inclusive in territorial scope. Without doubt, this fact had great weight with the court in the instant case.[14]

[12] State v. Divine, 98 N. C. 778, 4 S. E. 477 (1887); State v. Fowler, 193 N. C. 290, 136 S. E. 709 (1927) (A law applicable to five counties limiting the punishment for the first offense of violating the prohibition law to a fine, *held* a grant of special exemption, an arbitrary class distinction.).

[13] State v. Moore, 113 N. C. 697, 18 S. E. 342 (1893) (N. C. CONST. art. V, §3 authorizes a tax on trades and professions, and although it is not expressly provided that such tax shall be uniform, yet a tax not uniform would be inconsistent with other sections of the constitution. See Worth v. Wilmington and Weldon R. R., 89 N. C. 291 (1883); Dalton v. Brown, 159 N. C. 175, 75 S. E. 40 (1912) (An act levying a tax on lumber hauled by any lumber *company* using the public roads of a certain county was held to be a legitimate police regulation for the maintenance of the roads. A strong dissent urged that since the act did not apply to private individuals or other heavy haulers, the tax was void for lack of uniformity.); State v. Bullock, 161 N. C. 223, 75 S. E. 942 (1912) (Where the tax applied to *all* in the county who hauled heavy materials, it was unanimously held non-discriminatory.). The following cases involve acts or ordinances enacted under the police power, but do not exactly fit into the three categories set out in the text. Plott Co. v. Ferguson Co., 202 N. C. 446, 163 S. E. 688 (1932) (An act applicable to Buncombe County which sought to prescribe a greater measure of liability upon a bond of indemnity than was imposed in the other ninety-nine counties was held burdensome and discriminatory.); Edgerton v. Hood, Comm'r of Banks, 205 N. C. 816, 172 S. E. 481 (1934) (An act providing that depositors in closed banks in certain counties might sell their claims to debtors of the bank and that the bank should accept such claims at face value in payment of debts was held to be a discrimination against debtors and creditors of closed banks in other sections of the state.); State v. Sasseen, 206 N. C. 644, 175 S. E. 142 (1934) (A municipal ordinance requiring operators of vehicles for hire to deposit with the city treasurer policies of liability insurance or cash or securities was held void as creating a monopoly and a turning of business over to a privileged class since personal sureties were not allowed.).

[14] State v. Van Doran, 109 N. C. 864, 14 S. E. 32 (1891) (doctors); State v. Call, 121 N. C. 643, 28 S. E. 517 (1897) (doctors); State v. Hicks, 143 N. C. 689, 57 S. E. 441 (1907) (dentists); State v. Siler, 169 N. C. 314, 84 S. E. 1015 (1915) (osteopaths); State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921) (accountants); State v. Lockey, 198 N. C. 551, 152 S. E. 693 (1930) (barbers); Roach v. Durham, 204 N. C. 587, 169 S. E. 149 (1933) (plumbers); N. C. CODE ANN. (Michie, 1935) §5259(1)-(29) (cosmetologists).

The 1937 General Assembly evidently believed that by following existing interpretations of the constitutional prohibition against local laws,[15] that is, by the procedure of enacting a general law and excepting the counties that did not wish to require by law a showing of honesty and business capability from the real estate men, the odium of the previous law, held unconstitutional in the principal case, could be avoided. The 1937 Real Estate License Act,[16] which embodies the previous act almost word for word, is undoubtedly a general law, but it is not necessarily a state-wide law since 48 counties are excepted from its provisions.[17]

The 1937 act may be valid so far as the constitutional prohibition against local laws is concerned, granting that the prohibition is applicable at all to real estate dealing as "trade". The act might have been held not to violate this prohibition if it had originally been made to apply to all the counties except ninety-two, instead of to eight counties. It would not be a praiseworthy result, however, to hold that a law applicable to counties *A, B,* and *X* is invalid, whereas a law applicable to all counties excepting every county but *A, B,* and *X* is valid. Legal formalism is justly condemned when the form serves no purpose.

But even though the legislature has framed the new act to avoid possible violation of the prohibition against local legislation, the objection that the act is discriminatory is as forceful as ever. If the court adheres to its position that such regulation of the real estate business is a matter of state-wide, not local, concern, it is hard to see how the new act can escape the fate of the old, since real estate men in forty-eight counties do not have to meet the requirements of the act.[18]

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[15] In 1917 the North Carolina Constitution was amended, N. C. CONST. art. II, §29 prohibiting local laws in fourteen enumerated fields. Under this provision in distinguishing between general laws and local acts the court has gone so far as to hold that though the constitution prevented local legislation relating to bridges and ferries, an act which created in one county a commission for the building of bridges was valid. Huneycutt v. Comm'rs of Stanly County, 182 N. C. 319, 109 S. E. 4 (1921). It held that an act to be condemned as local must direct the construction of a particular bridge at a specific spot. Day v. Comm'rs of Yadkin and Surry counties, 191 N. C. 780, 113 S. E. 164 (1926). Likewise, the court held that a law was no less general because a number of counties were excepted from the act. *In re* Harriss, 183 N. C. 633, 112 S. E. 425 (1922) (though forty-four counties were excepted from the law establishing courts inferior to the Superior court, this was held to be a general law and as such valid despite the prohibition against local legislation in this field.). Spruill, *The Proposed Constitution and Special, Private, and Local Legislation in North Carolina* (1933) 11 N. C. L. REV. 140.

[16] P. L. N. C. 1937, c. 292, §§1-17½. [17] P. L. N. C. 1937, c. 292, §17½.

[18] In spite of the dicta by the North Carolina court in the principal case to the effect that a state-wide law regulating those engaged in the real estate business would be upheld, there are grounds for arguing that legislative control in this occupation is too wide an extension of the police power. The court quotes with approval from Rawles v. Jenkins, 212 Ky. 287, 292, 279 S. W. 350, 352 (1925) which held a state-wide regulation of the real estate trade unconstitutional. "'If